



February 26, 2002

Mr. Mark B. Taylor
City Attorney
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

OR2002-0909

Dear Mr. Taylor:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159134.

The City of San Marcos (the "city") received a request for "any and all documents and/or studies that address the issue of the Southwest San Marcos annexation differing 'significantly in land use and population density from existing areas within the city.'" You inform us that you are releasing certain responsive information to the requestor, but claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Pursuant to section 552.301(b), a governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the request. You state that the city received the request for information on December 5, 2001. In this regard, we note your assertion that the City Manager received the request on December 5, 2001, and that the City Manager is the city's public information officer. The requestor, however, claims that the request was received by the city on December 3, 2001 and has provided this office with a copy of a certified mail return receipt that shows the date of delivery as December 3, 2001. Therefore, we conclude that the city did in fact receive the public information request on December 3, 2001. As such, the ten-business-day deadline fell on December 17, 2001. Because the city did not request a decision from this office until December 18, 2001, it failed to meet the ten-business-day deadline prescribed by section 552.301(b). *See* Open Records Decision Nos 497 (1988) (Act does not require that member of public actually name chief administrative officer of governmental body in order to make valid request for information under Act; request is valid so long as it reasonably can be identified as request for public

records), 44 (1974) (where request has been directed to responsible person in position of authority, governmental body cannot ignore request simply because it may not have been directed to legal custodian of records).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(b) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.103, the "litigation exception," is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness under section 552.302.¹ Consequently, the city may not withhold the requested information under section 552.103. Because you do not argue the applicability of any other exceptions to disclosure, the requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general).

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 159134

Enc. Submitted documents

c: Mr. Billy McNabb
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(w/o enclosures)